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No.

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1983

ALPHA BLAIR, a widow,
and RICHARD BLAIR
Petitioners,

vs.

LARRY BOULGER,
Respondent.

**PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT
STATE OF NORTH DAKOTA**

RICHARD E. BLAIR
1020 First Avenue South
Fargo, North Dakota 58103
(701) 293-8932
For Petitioner Richard E. Blair

QUESTIONS PRESENTED FOR REVIEW

I. Whether a defendant is entitled to have an attorney who is given adequate time to prepare a defense or must be subjected to unfair treatment of instantaneous trial, by a hostile court, in violation of his due-process rights of the Fourteenth Amendment of the Constitution of the United States of America.

II. Whether the owner of real estate property is entitled to exercise the option to cancel a Contract for Deed as provided in the contract, or must be subjected to economic injury by lack of possession due to prejudicial violation of the prohibitions against impairing the obligation of contracts of Article I, Section 10, Paragraph 1 of the Constitution of the United States of America.

TABLE OF CONTENTS

	Page
Questions Presented for Review	i
Table of Authorities	iv
Opinion Below	1
Jurisdiction	1
Constitutional Provisions Involved	2
Statement of the Case	3
Reason Relied on for the Allowance of the Writ	4
I. The Supreme Court State of North Dakota, a state court of last resort, in denying a Petition for Rehearing by the appellant Erred and has decided an important question of Federal Law which is in violation of Section I of the Fourteenth Amendment of the Constitution of the United States of America and should be settled by this Court.	4
II. The Supreme Court State of North Dakota, a state court of last resort, in denying a Petition for Rehearing by the appellant Erred and has decided an important question of Federal Law which is in violation of Article 1, Section 10, Paragraph 1 of the Constitution of the United States of America and should be settled by this Court.	8
Conclusion	9
Appendix A:	
Opinion of the Supreme Court State of North Dakota	A-1
Appendix B:	
Stay of Mandate by the Supreme Court State of North Dakota	B-1

TABLE OF AUTHORITIES

Cases:

Baker v. McCollan, 443 U.S. 137, 140 (1979)	4
Marbury v. Madison, 1 Cranch, 137-2 L.Ed. 60 (1803) ..	6
McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 4 L. Ed. 579 (1819)	5

Constitution:

United States of America Constitution Amendment XIV, Section 1	2,4,5,6,7,9
United States of America Constitution Article I, Section 10, Paragraph 1	2,6,7,8,9,10

Statutes:

28 U.S.C. Paragraph 1254 (1)	2
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OPINION BELOW

No opinion was given by the Supreme Court State of North Dakota in denying the Petition for Rehearing. The order is printed in the Appendix hereto, p. A-1. (No. 10, 299)

JURISDICTION

The order of the Supreme Court State of North Dakota in denying the timely Petition for Rehearing was entered on July 21, 1983. Decision of Supreme Court State of North Dakota, June 30, 1983.

Memorandum Opinion, Findings of Fact, Conclusions of Law, dated January 29, 1982. Motion to Amend and Affidavits to Amend Memorandum Opinion, Findings of Fact, Conclusions of Law, February 26, 1982. Memorandum Opinion, Findings of Fact, Conclusions of Law, and Order for Judgment, June 15, 1982. Entry of Judgment, August 25, 1982. Amicus Curiae - Fargo Broadcasting Co. Inc. (KVNJ-TV, Fargo) November 30, 1981.

The jurisdiction of this Court is invoked under 28 U.S.C. Paragraph 1254 (1).

CONSTITUTIONAL PROVISIONS INVOLVED

United States of America Constitution, Amendment XIV, Section I:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; Nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

United States of America Constitution Article I, Section 10, Paragraph 1:

No State shall enter into any treaty, alliance or confederation; grant letters of marque and reprisal; coin money; emit bills of credit; make anything but gold and silver coin a tender in payment of debts; pass any bill of attainder, ex post facto law, or law impairing the obligation of contracts or grant any title of nobility.

STATEMENT OF THE CASE

Alpha Blair, 75, a widow, and Richard E. Blair, 50, of Fargo, North Dakota, were defendants in a counter-suit brought by Larry Boulger, 32, of Fargo. Boulger was represented by his lawyer-brother, 34. The Blairs had to rely on non-family persons to represent them as legal counsel.

Richard E. Blair appealed from a North Dakota District Court judgment awarding Boulger \$2,500 compensatory damages and \$5,000 exemplary damages for alleging that Blair had intentionally interfered with contractual relations between Boulger and Alpha Blair.

The Supreme Court State of North Dakota affirmed the judgment and modified some interest charges.

Following the Supreme Court State of North Dakota decision, Blair's attorney notified him of the decision. Blair inquired why part of the transcript was missing in which his trial attorney had notified the court the trial was being held under protest. The trial attorney had later accepted a position out of state, and Blair's appeal attorney was unaware of the protest fact.

The District Court opinion listed the wrong date of the trial, the transcript was missing the Opening Day Proceedings and the Supreme Court State of North Dakota in its review of the record had not noticed the transcript was incomplete and that the trial had been held under protest.

Blair then petitioned for a rehearing citing the events leading to the forced trial held under protest by his trial attorney, the missing transcript proceedings and why the Supreme Court State of North Dakota review of the record was incomplete, due to the incomplete transcript of the vital Opening Day Proceedings.

The Petition for a Rehearing was denied without comment July 21, 1983 at unreported time.

REASON RELIED ON FOR THE ALLOWANCE OF THE WRIT

I. The Supreme Court State of North Dakota, a state court of last resort, in denying a Petition for Rehearing by the appellant Erred and has decided an important question of Federal Law which is in violation of Section I of the Fourteenth Amendment of the Constitution of the United States of America and should be settled by this Court.

The first inquiry in any suit brought under Federal Law is "whether the plaintiff has been deprived of a right 'secured by the Constitution and laws'." *Baker v. McCollan*, 443 U.S. 137, 140 (1979).

The Supreme Court State of North Dakota in denying a Petition for Rehearing has made a departure from one of the most basic principles of American citizens in a right to a fair trial. This is a violation of the due process rights of the United States Constitution if there ever was one.

The North Dakota District Court judge had in pre-trial events suddenly ordered that Richard E. Blair had to have a separate attorney in place of one attorney for both Blair and Alpha Blair. This directive from the judge came on late Friday morning with the trial scheduled early Tuesday morning. Monday was a legal holiday in observance of the birthdays of President George Washington and President Abraham Lincoln.

Blair, an honorable man, dutifully scurried about attempting to secure an attorney that Friday afternoon and on the following day, Saturday. Monday, the legal holiday, the lawyers offices were closed. Approximately fifteen minutes before the trial, on Tuesday, Blair - by the grace of God - obtained a

lawyer. The attorney arrived breathlessly in time for the trial and requested a delay in order to prepare himself for the case, since he was not prepared for instantaneous trial. The judge banged down his gavel, and said the trial would begin immediately.

Blair's attorney immediately notified the court the trial was being held under protest. The outcome of the trial should not have been surprising since Blair's attorney was not prepared, having had no time to prepare, and was under a great and impossible handicap. While zero time was provided for Blair's trial attorney to prepare a defense, Boulger's lawyer-brother reported he had spent 40 hours in preparing for the trial. Is this Democracy? The Petitioners contend it most certainly is not under the Constitution of the United States of America.

These circumstances were brought to the attention of the Supreme Court State of North Dakota in the Petition for Re-hearing, once Blair's appeal attorney was made aware the trial was forced and held under protest.

It is this absolute violation of the due process rights of the Fourteenth Amendment of the Constitution of the United States that is relied on for the allowance of the Writ.

It should also be pointed out that the Supreme Court of the United States has long served as a clearing house for interpreting the Constitution as a limitation upon state governments in the sphere of human relations and private property interests.

In the case of *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 4 L. Ed. 579 (1819) this Court noted the need for the "end to be legitimate, let it be within the scope of the Constitution." The action of the North Dakota Courts in denying a defense attorney time to prepare, is neither legitimate nor within the scope of the Constitution.

The case of *Marbury v. Madison*, 1 Cranch, 137-2 L. Ed. 60 (1802), in which the decision was written by Chief Justice John Marshall, is significant also for expounding the constitutional theory of judicial review. It is certainly applicable in this case of the petitioner, who is fighting for his constitutional rights of equality in due process as an American citizen against an arbitrary and capricious act inflicted by a hostile North Dakota trial court.

The Error of the Supreme Court State of North Dakota by its denial of the Petition for Rehearing in deciding an important question of Federal Law involving the due process rights of the Fourteenth Amendment of the Constitution of the United States, is so substantial that it requires plenary consideration by this Court.

The Federal questions sought to be reviewed involving violations of the Constitutional rights of the Petitioner were first brought up in North Dakota District Court when Blair's attorney protested being forced into trial without preparation.

The Blairs, following the issuance of a Memorandum Opinion by the District Judge, made a motion to Amend Findings of Fact and Conclusion of Law of the Memorandum Opinion and submitted an Affidavit in support of the motion to Amend the Findings of Fact which touched upon Constitutional provisions of Federal Law. In all instances the District Court denied the protests and endeavors to Amend the Findings of Fact and Conclusions of Law. In the Appellate court the Federal questions were raised on the Petition for Rehearing.

Due to the total lack of preparation by Blair's trial attorney, vital evidence was not discovered and presented at the counter-claim trial.

Newly-discovered evidence that was not available at the trial has since come to light which indicates that Boulger had embarked upon a whole course of conduct which was designed to intimidate and pressure Blair to forego his Constitutional rights. This evidence presented to the Supreme Court State of North Dakota in the Petition for Rehearing, must change the entire conclusion of that Court, if it is admitted in evidence.

The decision of the Supreme Court State of North Dakota should, therefore, be reversed and there should be a dismissal of the plaintiff's claims against Blair. Whatever claim the situation in this case might give rise to under state law, it gives rise to no claim under the Constitution of the United States of America in view of the due process violations of trial court, and the forced trial without allowing adequate preparation for Blair's attorney. The whole situation was caused by arbitrary and capricious action which resulted in lack of a prepared counsel and a hostile court attitude.

II. The Supreme Court State of North Dakota, a state court of last resort, in denying a Petition for Rehearing by the appellant Erred and has decided an important question of Federal Law which is in violation of Article 1, Section 10, Paragraph 1 of the Constitution of the United States of America and should be settled by this Court.

It was explicitly brought to the attention of the Supreme Court State of North Dakota in the Petition for Rehearing that a Contract for Deed between Alpha Blair and Larry Boulger had been cancelled before the start of the counter-claim trial. The option for Alpha Blair to cancel the contract was specifically provided in the contract.

The appeal attorney for the Blairs pointed out to the Court that Boulger had concealed the breach of contract well past commencement of the lawsuit. In fact, Boulger, in pre-trial interrogatory questions, had wrongfully denied any breach when he knew fully that he had breached the contract. The Blairs have paid taxes on the property for the past five years.

The failure of the Supreme Court State of North Dakota to note the cancellation of the Contract for Deed in the Petition for Rehearing impairs the obligation of Boulger to obey the Contract and upon the demand of Alpha Blair, which has been made in writing to Boulger, to "quietly and peaceably to surrender to her possession of said premises."

This is in direct violation of Article 1, Section 10, Paragraph 1 of the Constitution of the United States of America, which prohibits any state from impairing the obligation of contracts. It is also in direct violation of Article I, Section 16 of the Constitution of North Dakota, which prohibits the impairing the obligation of contracts.

The Constitution of North Dakota in Article I, Section 3, states "The state of North Dakota is an inseparable part of the American union and the constitution of the United States is the supreme law of the land."

Therefore, the Supreme Court State of North Dakota in denying the Petition for Rehearing, under the special circumstances of this case, has decided an important question of Federal Law which is in violation of the Constitution of the United States.

The provisions in the Constitution of the United States relating to prohibitions impairing the obligations of contracts was first brought to the attention of the trial court in an Amicus Curiae brief filed by Fargo Broadcasting Co. Inc. (KVNJ-TV, Fargo) before the issuance of the Memorandum Opinion. It was also raised by the Blairs following the issuance of the Memorandum Opinion in a Motion and Affidavit to Amend the Findings of Fact, Conclusions of Law. In both instances, the trial court judge denied the issues of Federal Law pertaining to the Constitution of the United States of America.

The Federal question raised as to whether the owner of real estate property is entitled to exercise the option to cancel a Contract for Deed as provided in the contract, or must be subjected to economic injury by lack of possession due to prejudicial violation of the prohibitions against impairing the obligation of contracts of Article I, Section 10, Paragraph 1 of the Constitution of the United States is so substantial that it requires plenary consideration by this Court.

CONCLUSION

The denial of equal treatment and due process rights in the North Dakota Courts is repugnant to the law of the land. It is unpatriotic and un-American. It is the exact opposite of what this Great Nation has fought against throughout its illustrious history including World War I and World War II. The proceedings in the North Dakota Courts resulting in the violation of the Fourteenth Amendment to the Constitution

of the United States, and the violation of Article I, Section 10, Paragraph 1 of the Constitution of the United States, should be reviewed by this Court.

Wherefore, Your petitioner prays that a Writ of Certiorari be issued under the seal of this Court, directed to the Supreme Court State of North Dakota, to the end that this cause may be reviewed and determined by this Court; that the decree of the said Supreme Court State of North Dakota be reversed by this Court; and that he may be granted such other and further relief as to this Court may seem meet and proper.

Respectfully submitted,

RICHARD E. BLAIR
1020 First Avenue South
Fargo, North Dakota 58103

For Petitioner Richard E. Blair

APPENDIX

STATE OF NORTH DAKOTA
Supreme Court
Bismarck

Clerk of the Supreme Court
Mrs. Luella Dunn

July 21, 1983

Mr. Michael C. O'Neel
Attorney at Law
322 N. 5th St.
Fargo, ND 58102

RE: Blair v. Boulger
No. 10, 299

Dear Mr. O'Neel:

The Supreme Court has today entered an order denying the petition for rehearing in this case.

In accordance with Rule 41(a), NDRAppP, the mandate of the Supreme Court will be forwarded to the Clerk of the District Court after the expiration of seven days.

Sincerely yours,

Luella Dunn
Clerk
Supreme Court

LD:cf:tb

cc: Mr. John V. Boulger
The Honorable Norman J. Backes

STATE OF NORTH DAKOTA
Supreme Court
Bismarck

Clerk of the Supreme Court
Mrs. Luella Dunn

July 29, 1983

Mr. Richard E. Blair
1020 First Ave. S.
Fargo, ND 58103

Re: Blair v. Boulger
No. 10, 299

Dear Mr. Blair:

Your Motion for A Stay of Mandate was received and filed
in my office.

I have considered your Motion and have granted a 30 day
Stay of Mandate under the provisions of Rule 41 (b) NDRAppP.
This action is taken under the provisions of Administrative Rule
5.

Sincerely yours,

Luella Dunn
Clerk of the Supreme Court

LD:cf

cc: Mr. Michael C. O'Neel
Mr. John V. Boulger
The Honorable Norman J. Backes
The Honorable Gerald W. VandeWalle
The Honorable Ralph J. Erickstad

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**SUPPLEMENTAL APPENDIX
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RICHARD E. BLAIR
1020 First Avenue South
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(701) 293-8932

For Petitioner Richard E. Blair

**SUPPLEMENTAL APPENDIX
TABLE OF CONTENTS**

	Page
Appendix C: Decision of Supreme Court State of North Dakota, June 30, 1983	C-1
Appendix D: Petition for Rehearing in the Supreme Court State of North Dakota	D-1

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

Alpha Blair, a Widow,	Plaintiff
and	
Richard Blair,	Plaintiff and Appellant
v.	
Larry Boulger,	Defendant and Appellee

Civil No. 10,299

Appeal from the District Court of Cass County, the
Honorable Norman J. Backes, Judge.

JUDGMENT AFFIRMED AS MODIFIED.

Opinion of the Court by VandeWalle, Justice.

Michael C. O'Neel, Fargo for plaintiff and appellant.

John V. Boulger, of Solberg, Stewart, Boulger & Miller,
Fargo, for defendant and appellee.

Civil No. 10,299

BLAIR v. BOULGER

VandeWalle, Justice.

Richard Blair appealed from a judgment awarding Larry Boulger \$2,500 compensatory damages and \$5,000 exemplary damages for Blair's intentionally interfering with contractual relations between Boulger and Alpha Blair, Richard Blair's mother. We modify and affirm the judgment.

On January 8, 1974, Alpha Blair and her attorney met with Boulger to discuss the terms for the purchase by Boulger of a house owned by Mrs. Blair. The meeting took place at the office of Alpha's attorney and concluded with the execution of a contract for deed in which Mrs. Blair agreed to sell the house to Larry Boulger. A condition to the sale of the house was that Mrs. Blair would continue to occupy the main floor of the house at a rental cost of \$100 per month, which would be offset against the monthly payments on the principle made by Boulger to Mrs. Blair.

Mrs. Blair's son Donald, who was present during preliminary negotiations between his mother and Boulger for the sale of the house, encouraged her to sell. According to the testimony of Mrs. Blair, Donald, and another son, Bruce, Richard was upset when he learned the house had been sold. Richard's testimony is that he was not upset. Nevertheless, on June 10, 1974, several months after performance on the contract for deed had begun, Mrs. Blair executed a warranty deed, subject to the contract for deed, conveying to herself and Richard as joint tenants whatever interest she then had in the house.

A few months later, Richard, purportedly acting in his mother's behalf, called Boulger and said his mother wished to repurchase the house. Following an unfavorable response from Boulger, Richard, again purportedly acting at his mother's request, contacted an attorney to assist Mrs. Blair and Richard in getting the contract set aside.

The Blair's attorney sent several letters to Boulger stating a number of bases for rescinding the contract. Boulger's attorney replied that the Blair's claims were without merit and that Boulger considered Richard's conduct to constitute

intentional interference with the contract between himself and Richard's mother. Richard later acknowledged he had received copies of the letter from Boulger's attorney.

The next correspondence between the parties was a letter from Boulger to Richard Blair in which he demanded rent from Blair for the periods of time Richard lived with his mother after the sale of the house. In consequence, Richard and his mother instituted an action against Boulger to have the contract for deed cancelled. They claimed that Boulger induced Mrs. Blair to enter into the contract by fraudulently representing that Richard could occupy the first-floor apartment with his mother at no additional expense. Boulger counter-claimed, alleging (1) Richard owed Boulger rent for the time he lived with his mother after execution of the contract for deed; (2) Richard intentionally interfered with rights under the contract between Boulger and Mrs. Blair; and (3) Mrs. Blair, and Richard, breached the contract for deed. A trial to the court was set for February 20, 1980.

Prior to the commencement of trial, Richard Blair moved to have the complaint dismissed without prejudice. Mrs. Blair joined Richard in the motion. The court denied the motion, whereupon Richard and Mrs. Blair sought to have their complaint dismissed without prejudice. They were aware that if the court granted the motion it would amount to a determination that there were no fraudulent representations made by Boulger to Mrs. Blair which induced her to enter into the contract for the sale of her house. The court granted the motion, and the trial proceeded on Boulger's counterclaim.

In its memorandum opinion following trial, the court (1) dismissed the first count of the counterclaim for back rent, (2) found on the second count that Richard Blair had intentionally and maliciously interfered with the contractual relations between Boulger and Mrs. Blair, for which the court

awarded Boulger \$2,500 compensatory damages and \$5,000 exemplary damages, and (3) found on the third count that Mrs. Blair had breached the contract with Boulger but awarded no damages. Blair appealed only from the trial court's decision on the second count of the counterclaim.

II

Blair contends that the court's award of \$2,500 as compensatory damages represents compensation for attorney fees and, as such, is improper. He cites our decision in *Hoge v. Burleigh Cty. Water Management Dist.*, 311 N.W. 2d 23, 31 (N.D. 1981), for the general rule:

"[I]n the absence of any contractual or statutory liability, attorney's fees incurred by a plaintiff in the litigation of his claim are not recoverable as an item of damages, either in an action ex contractu or an action ex delicto."

Boulger counter-argues that the \$2,500 awarded as damages does not necessarily represent an award of attorney fees, and even if it does, the award is proper under an exception to the general rule cited above. The exception, sometimes called the "third party" exception, states that where the wrongful acts of one party, (A), cause another, (B), to bring or defend an action against a third party, (C), then (B) in a later action against (A) may recover the costs of litigation, including attorney fees, incurred by (B) in bringing or defending the earlier action against (C) which was the direct result of (A)'s wrongful act. E.g., *Campus Sweater & Sportswear v. M.B. Kahn Const.*, 515 F.Supp. 64 (D.S.C. 1979); *Roberts v. Ball, Hunt, Hart, Brown & Baerwitz*, 57 Cal.App.3d 104, 128 Cal.Rptr. 901 (1976); *Warren v. McLouth Steel Corp.*, 111 Mich.App. 496, 314 N.W. 2d 666 (1981).

Blair's response to this argument is that whether or not North Dakota recognizes a third-party exception, the facts of this case do not satisfy the requirements of the exception because, first, there was not an earlier action, and, second, if there was an earlier action, it was not against a third party.

Blair is correct in his assertion that, generally, attorney fees may not be awarded as an element of damages in the absence of contractual or statutory authority. However, we believe that sound reasoning as well as sound judgment supports recognition of some form of the third-party exception. The formulation of the exception, relevant to the particular facts of this case, which we adopt occurs in Section 914 of 4 *Restatement of Torts* 2d, p. 492, and states:

"(2) One who through the tort of another has been required to act in the protection of his interests by bringing or defending an action against a third person is entitled to recover reasonable compensation for loss of time, attorney fees and other expenditures thereby suffered or incurred in the earlier action."

This statement, in conformity with the third-party exception, requires that the person seeking to recover attorney fees must have been forced to bring or defend an *earlier action* against a *third party*. Hence, we must examine the facts to determine whether or not these requirements are satisfied in the instant case. Contrary to Blair's contention, we decide they are.

According to Blair, because the proceeding in which Boulger defended against a third party was the *same* proceeding in which he sought to recover attorney fees from Blair through a counterclaim, the wrongful acts he allegedly committed did not cause Boulger to defend against a third party in an

"earlier" action. The principle distinction upon which this argument rests is between a present and a prior *proceeding*.

The critical distinction as we see it is not between present and prior proceedings, but rather between litigation against a third party caused by the wrongful acts of another and litigation against the wrongdoer to recover attorney fees for having to defend against a third party. So long as the wrongful acts of a person cause another to become involved in litigation with a third party, the expense of litigating against the third party may be recovered from the wrongdoer who caused the litigation regardless of whether the action to recover attorney fees is brought in the same proceeding or in a subsequent proceeding. E.g., *Warren, supra*, 314 N.W. 2d at 672. But cf. *G & D Co. v Durand Milling Co., Inc.*, 67 Mich.App. 253, 240 N.W.2d 765 (1976).

Expenses incurred in litigation with the wrongdoer to recover attorney fees for having to litigate against a third party are not recoverable, however. Thus in a claim by (A) to recover from (B) expenses incurred in an earlier action, the earlier action which (A) was forced to bring or defend cannot have been against (B), the wrongful party. *Dassance v. Nienhuis*, 57 Mich.App. 422, 225 N.W.2d 789 (1975). The reason usually given for requiring the earlier action to be against a third party is that permitting (A) to recover from (B) expenses of litigation incurred in an earlier action against (B) may discourage the legitimate use of the courts to resolve controversies. See D. Dobbs, *Handbook on the Law of Remedies*, p. 3.8, p. 201. Provided that a claim or defense of a losing party is not frivolous, the prevailing party in a lawsuit should not be allowed to recover attorney fees resulting from litigation against the losing party. See Sec. 28-26-01, N.D.C.C.; see also *Dobbs, supra*, at 201.

Blair maintains that since he was a party to the original action brought against Boulger, the requirement of the third-party exception that the earlier action be one against a third party is not satisfied.

Blair's name appeared with his mother's on the complaint against Boulger, but the question whether or not he was a proper party to the action never was resolved by the trial court because the Blairs moved to dismiss their complaint with prejudice.

The complaint in question sought relief from Boulger for allegedly fraudulently inducing Alpha Blair to enter into the contract for deed. Richard Blair was not a party to the contract, nor did he acquire an interest in any of the proceeds his mother was to receive under the terms of the contract by the "interest" she conveyed to him on June 10, 1974. While Alpha Blair is alive, Richard has no independent, actionable interest to support a lawsuit against Boulger for misrepresentation of facts in the formation of the contract for deed between his mother and Boulger. If Richard had not interfered with the contractual relation between his mother and Boulger, the action against Boulger in all likelihood would never have arisen.

In its findings of fact, conclusions of law, and order for judgment, the trial court specially found that "the lawsuit [against Boulger] was instituted at the specific request of Plaintiff Richard Blair and Plaintiff Richard Blair agreed to pay the legal costs of such action."

A correct application of the third-party exception to the facts as determined by the trial court leads us to the conclusion that but for Richard's wrongful act of interference, the action for fraudulent representation would not have been brought against Boulger, and Boulger would not have had to

defend against Mrs. Blair, a third party, who was the real party in interest. Consequently, Boulger is entitled to recover attorney fees for defending against the claim for relief instituted by the Blairs; he is not, however, entitled to recover attorney fees for litigating his counterclaim against Alpha and Richard Blair.

Whether the court's award of \$2,500 as compensating damages was intended to represent attorney fees or actual damages, there is sufficient evidence in the record to support the award under either interpretation of the court's intention.

This determination forecloses discussion of Blair's next issue, which is "Whether the failure to prove actual damages precludes allowing punitive damages." Although it is true that an award of punitive damages is improper in the absence of an award of actual compensatory damages [*Riebe v. Riebe*, 252 N.W.2d 175 (N.D. 1977)], because we have decided that actual damages have been satisfactorily proved, Blair's question as to the propriety of awarding punitive damages no longer exists. See Sec. 32-03-07, N.D.C.C.

III

The final two issues we consider are:

(1) Whether or not the trial court's determination that Blair's acts of interference were without justification is clearly erroneous; and

(2) Whether or not the provision in the judgment and decree giving interest on the damages award before the date of the entry of judgment is improper.

In our consideration of the first of these issues, we note that the concept of "justification" is not clearly defined in the law

of interference with contractual relations. See *Seven D. Enterprises Ltd. v. Fonzi*, 438 F.Supp. 161 (E.D.Mich. 1977); 45 Am.Jur.2d, *Interference*, p. 27. Yet it is generally conceded that the motive of the defendant in interfering with contractual relations is highly determinative of the issue whether or not his actions were without justification. See *Stephenson v. Plastics Corporation of America*, 276 Minn. 400, 150 N.W.2d 668 (1967); W. Prosser, 2 *Restatement of Torts* 2d, 4th Ed., p. 129, pp. 942-943; 45 Am.Jur.2d, *Interference*, p. 28.

We adopt the view that where interference with contractual rights is done for the indirect purpose of injuring the plaintiff or benefitting the defendant at the plaintiff's expense, it is unjustifiable. *Seven D.*, *supra*, 438 F.Supp. at 163; *Stephenson*, *supra*, 150 N.W.2d at 680.

With respect to Blair's actions, the trial court determined that

(1) Blair was acting in his own interest to benefit himself at Boulger's expense;

(2) Blair intended to directly or indirectly injure Boulger; and

(3) Blair's actions were (i) not in good faith, (ii) with malice, and (iii) without justification.

Whether or not interference with contractual relations is justified is basically a question of fact [*Seven D.*, *supra*, 438 F.Supp. at 163; *Bennett v. Storz Broadcasting Co.*, 270 Minn. 525, 134 N.W.2d 892 (1965)], and the trial court's resolution of the question will not be set aside unless it is clearly erroneous [Rule 52(a), N.D.R.Civ.P.]. Consequently, we will not reverse the trial court's findings that Blair's actions were without justification unless we are definitely and firmly con-

vinced that the trial court made a mistake. E.g., *McGuire v. Gaffney*, 314 N.W.2d 851 (N.D. 1982). Our review of the record reveals adequate evidence to support the trial court's finding; accordingly, it is affirmed.

Blair's final argument is that the judgment and decree incorrectly permits Boulger to receive interest on the judgment of \$8,463.25 from January 29, 1982, the date of the memorandum opinion, rather than from August 25, 1982, which is the date judgment was entered.

Blair accurately points out that the trial court did not grant interest on damages in its memorandum opinion nor in the findings of fact, conclusions of law, and order for judgment. The award of interest appears for the first time in the judgment and decree, which was not signed by the trial court judge but by the clerk of the district court. Nowhere in the record do we find a manifestation of the trial court's intention to award interest from the date of the memorandum opinion.

In *Bratten v. Grabinski*, 77 N.D. 422, 43 N.W.2d 381, 384 (N.D. 1950), a case in which the trial court awarded \$350 damages, but the clerk of court in entering judgment included interest on the damages, this court held:

"[A] judgment must be supported by and conform to the decision with respect to the allowance of interest."

In the present case, because the judgment in specifying that interest is to be paid on damages from January 29, 1982, does not conform to the memorandum opinion or findings of fact, conclusions of law, and order for judgment, we modify the judgment to eliminate interest on the damages awarded from January 29, 1982. As a consequence, interest on the \$8,463.25 shall be payable from the date the judgment was

entered, i.e., August 25, 1982. See Sec. 28-20-34, N.D.C.C.
For the reasons given, the judgment is affirmed as modified.

Gerald W. VandeWalle
Vernon R. Pederson
P.M. Sand
William L. Paulson
Ralph J. Erickstad, C.J.

IN THE SUPREME COURT
STATE OF NORTH DAKOTA
No. 10, 299

Alpha Blair, a widow,
and Richard Blair,

Plaintiff
and
Appellant,

vs.

PETITION FOR REHEARING

Larry Boulger,

Defendant
and
Appellee.

APPEAL FROM JUDGMENT AND DECREE

From

DISTRICT COURT
OF THE EAST CENTRAL JUDICIAL DISTRICT

Honorable Norman J. Backes, Judge

MICHAEL O'NEEL
322 North 5th Street
Fargo, North Dakota 58102
Attorney for Plaintiff-Appellant Richard Blair

JOHN V. BOULGER
1129 5th Avenue South
P.O. Box 1897
Fargo, North Dakota 58107
Attorney for Defendant-Appellee

PETITION FOR REHEARING

Richard Blair, the Plaintiff-Appellant, presents this, his petition for a rehearing in the above entitled cause, and in support thereof, respectfully shows:

POINT I

By denying Richard Blair's motion for continuance, the trial court denied him a fair trial. The Court should remand the case to the trial court for a new trial.

On February 20, 1980, in the morning on which the trial on the counterclaim began, the trial court denied the motion of Tom Eastman (Attorney for Richard Blair at the trial) for a continuance of the trial. This denial was an abuse of discretion which prevented Richard Blair from having a fair trial. Counsel for Richard Blair was simply unprepared for trial due to circumstances beyond their control.

This issue was not argued by Richard in his brief. However, this Court has stated that a petition for rehearing must distinctly point out something which has been overlooked in the statutory provisions or the controlling principles of law, or which was not called to the attention of the court on argument or in the brief. [emphasis added]

Coal Harbor Stock Farm, Inc. v. Meier, 191 N.W.2d 583, 589 (N.D. 1971). Such is the case now. However, unlike the situation in *Northern Pac. Ry. Co. v. Warner*, 45 N.W.2d 196, 205 (N.D. 1950), in which the

question presented in the petition for rehearing had not been discussed in the briefs or arguments, but . . . was not presented by the pleadings, nor was it suggested anywhere else in the record, including the transcript.

Here the new issue was raised in the trial court by motion. Tr. 2-5.

The events on the eve of the trial show why Richard Blair's attorney at the trial was unprepared and why consequently Richard Blair did not receive a fair trial.

Richard and Alpha Blair, just before the trial, were both represented by the same attorney, Neil Gillund. However, during pre-trial proceedings on the Friday before the trial, February 15, 1980, Richard Blair was ordered by the trial court to procure counsel of his own. This proceeding was not included in the transcript that Richard's attorney on this appeal, the undersigned, had ordered from the court reporter because he used the date on the court's Memorandum Opinion of February 20, 1980, as the date of the beginning of the trial. Furthermore, the pre-trial events of Tuesday, February 19, 1980, were for the same reason, not included and this present counsel was likewise unaware of Tuesday's events except for brief mention in the opening pages of the transcript.

Richard Blair was ordered on Friday morning, February 15, 1980, to procure counsel of his own by Tuesday morning, February 19, 1980. Thus Richard had only the rest of Friday and early Tuesday morning to seek counsel because law offices were closed Saturday and Sunday, and that Monday, February 18, 1980, was Presidents' Day, a legal holiday. Thus Richard was expected to secure counsel of his own in less than one business day, to represent him in the trial of an action that had been commenced some three years earlier, for which there had been five depositions taken, and for which there had been a plethora of motions, discovery, filings, and other communications. For example, the Court can form some idea by noting that at the trial, there were introduced 46 exhibits, as well as by looking at the voluminous record the District Court sent up. There was simply too much Mr. Eastman did not know and needed to know but lacked the time to find out. Indeed, the file had already become enormous.

Some 30 minutes before his Tuesday morning appearance before the court, Richard Blair secured the services of Attorney Tom Eastman. Mr. Eastman moved the court for a continuance, mainly on the ground that he had just entered the case. The first few pages of the transcript, which began with the events of Wednesday, February 19, make some mention of such a motion having been made "yesterday" (Tr. 2, LL. 9-11), yesterday being Tuesday. Some lapse of 22 hours, day and night, Attorney Eastman argued before the court, was not a sufficient or even an adequate time to prepare for a trial that opposing counsel had said took him some 40 hours of preparation time. (Tr. 2, LL. 13-17), and not to mention that the same attorney had been with Larry Boulger during all of the events preceding the trial. The court denied the motion for a continuance without comment on its reason.

Richard Blair maintains that because the trial court ordered him to procure another separate counsel, and that he had reasonably relied upon being able to be represented by Attorney Gillund, that such haste in trying to procure another counsel should have meant that the court, in all fairness, should have allowed his new counsel an adequate time to prepare for trial. But because the court denied Richard Blair's new attorney's motion for a continuance, Richard was plunged into an immediate trial without the benefit of a prepared and adequate counsel. If Richard had dismissed his own counsel, the court's denial of a continuance would be understandable. But because the court ordered a new counsel, the denial of the continuance is no more than effectively a denial to Richard of the benefit of counsel and the resultant denial to him of a fair trial.

The transcript as provided by the court reporter shows that opposing counsel's version was that the court ordered Richard Blair to procure separate counsel if he could. Tr. 1, LL. 4-7. Richard disputes that version, but because that hearing was not included in the official transcript as provided,

he cannot now point to the words the court used. Richard Blair, therefore, asks the Court to permit him sufficient time within which to order an official copy of the transcript that will cover all of the recorded pre-trial proceedings and after that is received, to permit him to reargue this issue.

If the Court will not so permit time for Richard Blair to order and receive a copy of the transcript of these pre-trial proceedings, then he asks the Court to remand the case to the trial court for retrial on the ground that he was, by the court's denial of his request for a continuance, coming on top of the court's order for him to secure separate counsel on the eve of the trial, denied a fair trial and thus denied due process of law contrary to the Fourteenth Amendment of the U.S. Constitution and of Article I, Section 13 of the Constitution of North Dakota.

POINT II

Because of the excusable lack of preparation of Richard Blair's attorney at the trial, vital evidence was not discovered and presented at the trial of the counterclaim. Richard Blair should have a chance for a fair trial at which, by his counsel being prepared, he can present this evidence.

This evidence consists of one letter (attached as Exhibit A) which was among some thirteen letters from Larry Boulger to Richard Blair demanding rent, as well as evidence of verbal demands for rent.

Exhibit A was not available at the trial for reasons that are excusable. Some few months after the trial on the counterclaim had terminated, Richard Blair came into possession of a letter written and signed by Larry Boulger and demanding rent from him to November 1, 1977, in the amount of \$4,813.29 (including interest). This letter was sent by certified mail on October 29, 1977, to Richard Blair at 1020 1st

Avenue South, Fargo, North Dakota 58102, and is attached and marked as Exhibit A.

This letter had been in the possession of Attorney Edward King of Moorhead, Minnesota, who had been Alpha and Richard Blair's attorney, but who was forced to withdraw from their case in late 1979 because of his failing health and lapses of memory. Some few months after the trial, Attorney King contacted Richard, asked him to come to his office, and when there, Mr. King gave Richard this letter (Exhibit A) which had been in Mr. King's possession as the Blair's attorney. Since then, Mr. King has passed away.

The other letters cannot at this time be produced. Copies of three of them are in the record sent by the Cass County District Court to the Court in Bismarck for this appeal, and are Exhibits 11, 12 and 13 to the Deposition of Richard Blair on December 26, 1979, the Deposition being marked as Defendant's Exhibit 26 at the trial. The Deposition indicates the following information on pages 80-89: that the letters were from Larry Boulger to Richard Blair demanding rent payments, that they were sent shortly after the initial contact by Richard with Attorney Nelson in Grand Forks in November 1975 (long before the lawsuit began), and that they all end, as does Exhibit A attached to this Petition, with the sentence: "Make no mistake about it, Mr. Richard Blair, this statement is for your rent" (emphasis in original).

In addition, Richard Blair testified that he received several such letters, and received one such letter each month. Tr. 111, LL. 25. This would make some eleven such letters demanding rent prior to the time Richard joined his mother in the lawsuit. And further, Richard testified that he regarded the letters as a threat. Tr. 241, LL. 2-7.

The evidentiary significance in Exhibit A and the other letters not placed into evidence at the trial by Richard's attor-

ney is that they show that Larry Boulger made rent demands upon Richard upon more than one occasion. Only one occasion was pointedly introduced at the trial, the rent demand letter dated March 8, 1976 (Defendant's Exhibit 7). Richard Blair has argued in his brief that he was justified in joining with his mother in this lawsuit because of Larry Boulger's unjustified and harassing demands for rent made upon him. This evidence markedly bolsters this claim by showing a whole concourse of conduct on the part of Larry Boulger, both before and after the lawsuit had been initiated, which was designed to intimidate him and to pressure him into quitting the lawsuit after it was begun. How else can one view the monthly demands for rent?

This conduct was in bad faith because no claim had ever been made by Larry Boulger that Richard was a renter of his or stood in any similar relationship. Indeed, the letters from Attorney Nelson in December 12, 1975, seemed to prompt the demand for rent, a demand in sheer retaliation for daring to contact an attorney to raise the contract for deed as a possible legal problem. The demands for rent were an issue that could only be settled in a court of law. And it should be noted that the trial court, on Larry Boulger's counterclaim for rent from Richard, found that no rent was owing, thus demonstrating the unreasonableness of the rent demands and further justifying Richard's joining of the lawsuit with his mother.

Richard Blair asks the Court to reconsider its decision that he was not justified in joining the lawsuit with his mother, and consequently to find that he did not interfere with the contractual relations between Alpha Blair and Larry Boulger.

If the Court will not so find, Richard Blair asks the Court to remand the case for a new trial so that Richard can properly introduce complete evidence as to the rent demands, to show both their frequency and bad faith. His attorney at the trial

was unprepared because the trial court had ordered Richard, at the last minute, to secure counsel of his own, and thus could not, in so brief a time, ferret out relevant and material evidence that would become important as he became decently acquainted with the case. Richard, in all fairness, should have a new trial.

POINT III

Richard Blair would point out to the Court that he did have an interest in the house by virtue of the statutory cancellation of the contract for deed that Alpha Blair made on December 31, 1979, which the Court may take judicial notice of as having been filed in the office of the Cass County Register of Deeds. This cancellation then made Richard and Alpha the sole owners in joint tenancy of the house by virtue of the deed in joint tenancy executed on June 10, 1974, from Alpha Blair to Alpha Blair and Richard Blair. Having an interest in the property negates the court's finding that Richard Blair was not justified in any of his actions.

Larry Boulger did not have the premises insured in 1977, a direct violation of the terms of the contract for deed which required him to keep insurance on the premises. This failure to insure entitled Alpha Blair, according to the terms of the contract for deed, to declare a default and cancel the contract for deed, at her sole option. This she did on December 31, 1979, and so filed the cancellation with the Cass County Register of Deeds, with the effect that she has been paying taxes on the house ever since.

But the breach by Larry Boulger had occurred earlier than the formal cancellation; in 1977 there was no insurance on the premises and Alpha Blair did not know that then and Larry Boulger did not so inform her. Thus Larry Boulger's concealment of the breach would entitle Richard to an interest as of the date of the breach, thus giving him a property in-

terest in the house as of the commencement of the lawsuit.

The trial court found that Alpha Blair had breached the contract for deed by failing to deliver a Warranty Deed to Larry Boulger. App. 33. However, Alpha Blair did not deliver a Warranty Deed to Larry Boulger because he had breached the contract for deed by failing to insure the premises. Thus Larry Boulger's breach is a legitimate defense to Larry Boulger's counterclaim that Alpha had breached the contract herself.

Thus, further evidence of the cancellation of the contract for deed would show that Richard was a proper party to the action and that Richard, in pressing the lawsuit (as the court found), would have committed no interference because he was properly one of the plaintiffs.

Richard Blair asks the Court, for the reasons of the unpreparedness of his counsel as has already been stated, to remand the case to the trial court for trial anew so that full and complete evidence of the cancellation of the contract for deed could be admitted.

Dated this 13th day of July, 1983.

MICHAEL O'NEEL
322 North 5th Street
Fargo, North Dakota 58102
(701) 293-8050
Attorney for Plaintiff and
Appellant Richard Blair

L.J. BOULGER APTS.
123 - 10th Str. So.
Fargo, North Dakota

Mr. Richard Blair
1020 - 1st Ave. So.
Fargo, North Dakota

Mr. Richard Blair

This is a statement for rent due commencing as of Feb. 1, 1974 at the rate of \$100.00 per month for your residence in the main floor apartment at 1020 1st Ave. So. in Fargo. In addition to the above mentioned rent of \$100.00 per month there is interest due at the rate of 6% per annum on the amount which has not been paid which interest commences as of April 1, 1976 and continues therefrom. This leaves a total bill payable by you as of Nov. 1, 1977 in the amount of \$4813.29.

Make no mistake about it Mr. Richard Blair, this statement is for your rent.

Sincerely,
Larry J. Boulger

Exhibit A

-D-11-



Mr. Richard Blair
1020-1st Ave. So.
 Fargo, North Dakota 58102



Exhibit A

